

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

United States Court of Appeals  
Fifth Circuit

**FILED**

October 10, 2008

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No. 07-50184  
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Charles R. Fulbruge III  
Clerk

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

EMILIO PENA-NAJERA

Defendant-Appellant

\_\_\_\_\_  
Appeal from the United States District Court  
for the Western District of Texas  
2:06-CR-689-ALL  
\_\_\_\_\_

Before JOLLY, BARKSDALE and HAYNES, Circuit Judges.

PER CURIAM:\*

Emilio Pena-Najera pled guilty to a one-count indictment for possession of marijuana with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). His sole issue on appeal is based upon his contention that the district court erred in failing to award him a reduction of his sentence under the "safety-valve provision" of 18 U.S.C. § 3553(f) and section 5C1.2 of the United States Sentencing Guidelines. Pena-Najera alleges that the district judge failed to make an "independent determination."

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\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

We have carefully reviewed the sentencing record, and we conclude that the district judge did make an "independent determination." It was Pena-Najera's burden to prove that he was entitled to the "safety-valve" reduction, and he failed to meet that burden. *United States v. Flanagan*, 80 F.3d 143, 146 (5th Cir. 1996); see also *United States v. Cervantes*, 519 F.3d 1254, 1258 (10th Cir. 2008) ("he who has the burden of proof must put on some evidence at a sentencing hearing to allow the district court to find, by a preponderance of the evidence, that he is eligible for the safety-valve adjustment.").

Accordingly, the judgment of the district court is **AFFIRMED**.